Supreme Court, U.S.
FILED
MAY 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1382

In the Supreme Court of the United States

OCTOBER TERM, 1985

RAMON COOPER ROSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

MAURY S. EPNER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court erred by admitting into evidence a statement volunteered by petitioner at the time of his arrest.

2. Whether the district court abused its discretion by denying petitioner's motion for a new trial on the basis of newly discovered evidence.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 6

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 7

Alcorta v. *Texas*, 355 U.S. 28 10

Brady v. *Maryland*, 373 U.S. 83 ..... 4, 7

Davis v. *Alaska*, 415 U.S. 308 10

Giles v. *Maryland*, 386 U.S. 66 10

Lawn v. *United States*, 355 U.S. 339 7

Mesarosh v. *United States*, 352 U.S. 1 10

Miller v. *Pate*, 386 U.S. 1 10

Miranda v. *Arizona*, 384 U.S. 436 ..... 6, 7, 8

Randall v. *Estelle*, 492 F.2d 118 8

Rhode Island v. *Innis*, 446 U.S. 291 7

United States v. *Cardarella*, 588 F.2d 1204 9

United States v. *Herman*, 614 F.2d 369 9

United States v. *Johnson*, 596 F.2d 147 9

Page

Cases—Continued:

United States v. *Librach*, 609 F.2d 919, cert. denied, 444 U.S. 1080 10

United States v. *Lovasco*, 431 U.S. 783 7

United States v. *Pappas*, 602 F.2d 131, cert. denied, 444 U.S. 949 9

United States v. *Rodriguez*, 738 F.2d 13 10

Constitution, statutes and rule:

U.S. Const. Amend. VI 10

21 U.S.C. 841(a)(1) 1

21 U.S.C. 843(b) 2

Fed. R. Crim. P. 16(a) 4, 5, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1382

RAMON COOPER ROSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a-14a) was entered on October 21, 1985, and a petition for rehearing was denied on November 20, 1985 (Pet. App. 15a). On January 14, 1986, Justice White extended the time for filing a petition for a writ of certiorari to February 18, 1986, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and five

counts of using a telephone to facilitate a narcotics transaction, in violation of 21 U.S.C. 843(b). He was sentenced to three years' imprisonment on the possession count and a two-year term on each of the facilitation counts. The two-year terms on the facilitation counts were made to run concurrently with each other but consecutively to the three-year term on the possession count. Petitioner also was sentenced to a three-year special parole term and ordered to pay a $10,000 fine.

1. The evidence adduced at trial, as summarized in the opinion of the court of appeals (Pet. App. 2a-5a), showed the following. In October or November 1983, Donald McCoy observed a transaction in which petitioner purchased eight ounces of cocaine. Petitioner gave the cocaine to McCoy and directed McCoy to divide the substance into one-ounce and one-gram units. McCoy disposed of five ounces of the repackaged cocaine and retained the remaining three ounces. In early December 1983, petitioner gave McCoy an additional eight ounces of cocaine for repackaging. McCoy retained possession of this cocaine as well. *Id.* at 2a.

McCoy and his attorney met with an Assistant United States Attorney on December 12, 1983, and agreed to cooperate with the government. Police officers then furnished McCoy with a portable tape recorder and requested that he record certain telephone conversations. The next day, McCoy informed the authorities that he was in possession of 11 ounces of cocaine belonging to petitioner. To dispel their skepticism regarding McCoy's claim, the authorities directed McCoy to telephone petitioner. During the recorded telephone conversation, petitioner asked McCoy if McCoy had the cocaine in his possession. Later that evening, petitioner twice telephoned McCoy and discussed the cocaine. Pet. App. 2a-3a.

McCoy again met with law enforcement officers on the following day, December 14, 1983. At the officers' request, McCoy telephoned petitioner and told petitioner that he had a friend who wished to purchase two ounces of cocaine for $2,200 per ounce. Petitioner agreed to sell the cocaine and asked McCoy to package the remaining cocaine in one-ounce units. In a subsequent telephone conversation, petitioner and McCoy agreed to meet the following day so that McCoy could return petitioner's cocaine. Pet. App. 3a-4a.

On December 15, McCoy—who had been outfitted with a concealed transmitter—drove to the prearranged location where he met petitioner, who arrived in a pickup truck. McCoy entered the truck and delivered the cocaine to petitioner. While the two men were in the truck, petitioner asked McCoy, "How many ounces is that?" McCoy replied, "All that you give me." Petitioner then asked, "Did you put it in ounces for me?" to which McCoy responded, "There's ounces and there's . . . grams in there too." Pet. App. 4a. McCoy gave petitioner the package, exited the pickup truck, and signaled to the law enforcement officers that petitioner was in possession of the cocaine (*ibid.*).

As petitioner drove toward the parking lot exit, Dallas police officers Jerry Foster and Ron Hale, who had been conducting surveillance from a police vehicle, cut in front of petitioner's truck. Officer Foster immediately went to the truck, opened the door on the driver's side, and helped petitioner out of the truck. Officer Foster seized the package delivered by McCoy, which was located in the middle of the floorboard of the pickup truck, and told petitioner that he was under arrest. Pet. App. 4a-5a; III Tr. 576-577. Petitioner asked Officer Foster why he was under arrest and Officer Foster replied, "for violation of the Controlled Substances Act" (Pet. App. 20a). Petitioner asked, "What is the Controlled Substances Act," and Officer Foster answered,

"Possession of dope" (*id.* at 21a). When petitioner asked "What do you mean," Officer Foster replied "cocaine" (*ibid.*). Petitioner then declared, with reference to the seized package, that he did not know "what's in it because Don McCoy just dropped it off with me" (*ibid.*).

2. The prosecutor did not learn about petitioner's statements to Officer Foster until after the trial was under way; at that point, the prosecutor immediately asked the district court to rule upon the admissibility of the statements. Petitioner contended that the statements were inadmissible because they constituted exculpatory evidence that had not been disclosed to the defendant as required by Rule 16(a) of the Federal Rules of Criminal Procedure and this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963). Petitioner also moved for a mistrial. III Tr. 586-589; IV Tr. 667-674.

The district court offered to exclude the evidence, but noted its concern that if the statements "were to be offered for the first time by [petitioner] during his case in chief * * * it would give a misleading impression to the jury and suggest to them that the government was somehow hiding the ball or suppressing the evidence" (Pet. App. 19a). Petitioner's counsel refused to state that he would not offer the evidence in petitioner's case. The court accordingly denied the motion and allowed the government to introduce the statements (*id.* at 19a-20a).

3. The court of appeals affirmed petitioner's convictions in an unpublished opinion (Pet. App. 1a-12a). It rejected petitioner's claim that the district court should have declared a mistrial because the government did not disclose before trial that Officer Foster would testify that petitioner had told him, " 'I don't know what's in [the bag] because Don McCoy just dropped it off with me' " (*id.* at 8a-9a). The court noted that the statement was inculpatory as well

as exculpatory because "it is an admission of possession and knowledge" (*id.* at 9a). The court of appeals observed that the district court had "allowed the prosecution to introduce the evidence largely on the grounds that to prohibit its introduction by the prosecution would create the unfair impression that the government had suppressed or concealed the evidence if it were later introduced by the defense" (*ibid.*). The court concluded that "[i]t was certainly no burden to the defense to have to decide at the evidentiary hearing whether [petitioner] would introduce this simple evidence in his own behalf; accordingly, [petitioner] has shown no prejudice" (*ibid.*).

The court of appeals further concluded that the prosecution did not violate Rule 16(a) of the Federal Rules of Criminal Procedure by failing to disclose the statements. Rule 16(a) provides, in pertinent part, that the government must disclose "the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant * * * in response to interrogation by any person then known to the defendant to be a government agent." The court found that "Rule 16(a) does not apply to this 'confession' because it was not made in response to any interrogation" (Pet. App. 9a).

The court of appeals also upheld the district court's denial of petitioner's motion for a new trial based on newly discovered evidence. After the trial ended, petitioner and the government learned that McCoy had testified before a federal grand jury in 1980. Petitioner contended that his discovery of the fact that McCoy had testified before a grand jury entitled him to a new trial, even though he did not know anything about the substance of McCoy's grand jury testimony. Pet. App. 11a.

The court of appeals observed that "[t]o be entitled to a new trial on the grounds of newly discovered evidence, a convicted person must establish at least that: (1) the evidence is newly discovered; (2) the evidence is material and not merely [of] cumulative or impeaching value; (3) the evidence would probably lead to an acquittal; and (4) the failure to learn of the evidence was due to no lack of defense diligence" (Pet. App. 11a-12a). The court noted that McCoy had testified at the trial that he " 'probably' " had appeared before a grand jury (*id.* at 12a). Since petitioner was on notice of the likelihood that such testimony existed, the revelation that McCoy had testified before a grand jury could not constitute newly discovered evidence. In addition, the court noted that petitioner "presented no affidavits or other evidence with his motion for a new trial" and that "[c]ertainly there has been no showing that this 'new' evidence would produce an acquittal" (*ibid.*). It held that the "district court did not abuse its discretion in denying the motion for a new trial" (*ibid.*).[1]

ARGUMENT

The unanimous decision of the court below is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

1. Petitioner first contends (Pet. 6-11) that his statement to Officer Foster concerning the contents of the package delivered by McCoy should have been suppressed under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). As a threshold matter, this question is not properly before the Court

---

[1]The court of appeals also rejected petitioner's challenge to the district court's failure to instruct the jury regarding the entrapment defense (Pet. App. 5a-8a), his claims relating to the government's failure to disclose other allegedly exculpatory information (*id.* at 8a-10a), and his contention that the district court erred in denying his motion for a new trial on the grounds of perjured testimony (*id.* at 10a-11a).

because petitioner did not previously challenge the admission of this statement on the ground that the statement was obtained in violation of *Miranda*.[2] Since the issue was not raised in the courts below, it may not now be raised in this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958). In any event, the claim is wholly without merit.

The warnings prescribed in *Miranda* v. *Arizona, supra*, must be administered to a suspect only when the suspect is subjected to "custodial interrogation." Accordingly, statements volunteered by a suspect may be admitted into evidence without regard to whether the *Miranda* warnings were administered; a statement must be suppressed only when it was the product of custodial interrogation and was not preceded by the warnings. 384 U.S. at 444-445; see also *Rhode Island* v. *Innis*, 446 U.S. 291, 297, 299-300 (1980). The Court in *Miranda* defined custodial interrogation as "*questioning initiated by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" (384 U.S. 444 (emphasis added)). This concept was refined further in *Rhode Island* v. *Innis, supra*, where the Court stated that the inquiry is whether the police officer's conduct "reflect[s] a measure of compulsion above and beyond that inherent in custody itself" (446 U.S. at 300).

---

[2]In both the district court and the court of appeals, petitioner contended that this statement should have been suppressed because the prosecution did not comply with its obligation to disclose the statement under Rule 16(a), Fed. R. Crim. P., and the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963). See III Tr. 586-589; IV Tr. 667-674. The courts below rejected these claims, and petitioner has not raised either of them in this Court.

Officer Foster did not initiate any questioning of petitioner; he simply responded to petitioner's questions. The exchange between Officer Foster and petitioner makes clear that petitioner volunteered the statement that he now seeks to suppress (see Pet. App. 20a-21a). In evaluating petitioner's claim that the government failed to comply with Rule 16(a) of the Federal Rules of Criminal Procedure, the court of appeals correctly concluded that petitioner's statement "was not made in response to any interrogation" (Pet. App. 9a). For that reason, *Miranda* is not implicated here.

Petitioner asserts (Pet. 10-11) that Officer Foster's statements, and the fact that he was holding the package found in petitioner's truck, amounted to "the functional equivalent of express interrogation" (*id.* at 10). This Court stated in *Innis* that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (446 U.S. at 301 (footnotes omitted)). Under that standard, Officer Foster's conduct clearly did not constitute interrogation. Officer Foster had no reason to expect that his conduct would elicit an incriminating statement from petitioner; he simply responded to petitioner's questions while retaining custody of an important piece of evidence. Moreover, Officer Foster's actions plainly were those "normally attendant to arrest and custody" and thus cannot be classified as "interrogation." *Miranda* therefore does not require the suppression of petitioner's volunteered statement.[3]

---

[3]Petitioner's reliance (Pet. 10) upon *Randall* v. *Estelle*, 492 F.2d 118 (5th Cir. 1974), is misplaced. The defendant in that case "was the focal point of an intensive interrogation by three police officers in the distinctly unfamiliar environs of a police car" (492 F.2d at 120). By contrast, petitioner was not subjected to any express interrogation.

2. Petitioner also contends (Pet. 11-15) that he was entitled to a new trial on the basis of newly discovered evidence. However, the court of appeals properly concluded (Pet. App. 11a) that the district court did not abuse its discretion in denying petitioner's motion for a new trial.

During the trial, petitioner's counsel asked McCoy whether McCoy had testified before a federal grand jury during 1981 in connection with " 'some of [his] other cases' "; McCoy stated that he could not recall (Pet. 11). In response to a subsequent inquiry relating to previous grand jury testimony, McCoy answered, "I probably have. I don't remember the exact time. I have been before, I imagine, yes, sir" (Pet. App. 12a). Petitioner observes that "[t]he matter [of McCoy's prior grand jury testimony] was not thereafter pursued" at trial (Pet. 12). After trial, however, both petitioner and the government discovered that McCoy had testified before a federal grand jury in 1980 (Pet. App. 11a). Petitioner's motion for a new trial was based upon this alleged newly discovered evidence.

To demonstrate that he was entitled to a new trial on this ground, petitioner was required to establish that (1) the evidence was newly discovered; (2) the evidence was material and not merely cumulative or impeaching; (3) the evidence probably would lead to an acquittal; and (4) his failure to discover the evidence until after trial was not occasioned by his lack of diligence. *United States* v. *Herman*, 614 F.2d 369, 371 (3d Cir. 1980); *United States* v. *Pappas*, 602 F.2d 131, 133 (7th Cir.), cert. denied, 444 U.S. 949 (1979); *United States* v. *Johnson*, 596 F.2d 147, 148 (5th Cir. 1979); *United States* v. *Cardarella*, 588 F.2d 1204, 1205 (8th Cir. 1978). Petitioner plainly failed to satisfy this standard.

First, petitioner has made no showing that the evidence is material and not merely cumulative or impeaching. Indeed, petitioner argues that the evidence is important *solely*

because it might provide a basis for impeaching McCoy (Pet. 13-14). This is ordinarily not a sufficient reason for requiring a new trial. See *Mesarosh* v. *United States*, 352 U.S. 1, 9 (1956); *United States* v. *Rodriguez*, 738 F.2d 13, 18 (1st Cir. 1984); *United States* v. *Librach*, 609 F.2d 919 (8th Cir. 1979), cert. denied, 444 U.S. 1080 (1980).

Second, as the court of appeals observed, petitioner has not established that "this 'new' evidence would produce an acquittal" (Pet. App. 12a). Petitioner states (Pet. 14) that McCoy was "the pivotal witness," but he does not indicate how the allegedly "new" evidence would cast doubt upon McCoy's testimony.[4]

Finally, the court of appeals noted that McCoy's trial testimony "put [petitioner] on notice, if it did not give actual knowledge, that McCoy had testified previously" (Pet. App. 12a). This finding that petitioner failed to exercise diligence in pursuing the question of the existence of grand

---

[4]Petitioner intimates (Pet. 13-14), that the Sixth Amendment somehow is relevant in assessing his claim. But the Sixth Amendment has no bearing on this case, as petitioner was not in any way denied his right to confront McCoy. Petitioner's reliance upon *Davis* v. *Alaska*, 415 U.S. 308 (1974), is misplaced. In that case, which did not concern newly discovered evidence, this Court reversed the defendant's conviction after the trial court severely limited his cross-examination of "a crucial witness for the prosecution" (415 U.S at 310). Petitioner, by contrast, encountered no such limitation on his ability to cross-examine McCoy. Any inadequacy in the cross-examination of McCoy resulted from petitioner's own failure to pursue the question of McCoy's grand jury testimony.

Moreover, petitioner has not shown that the government knowingly elicited or failed to correct perjured testimony, as was the case in *Alcorta* v. *Texas*, 355 U.S. 28 (1957); *Miller* v. *Pate*, 386 U.S. 1 (1967); and *Giles* v. *Maryland*, 386 U.S. 66 (1967). Indeed, petitioner does not dispute the court of appeals' conclusion (Pet. App. 11a) that the government did not learn of McCoy's 1980 grand jury testimony until after the end of the trial.

jury testimony is itself a sufficient reason for the denial of petitioner's motion for a new trial.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

MAURY S. EPNER
Attorney

MAY 1986

---

[5]Petitioner asserts that the prosecution also "knew or should have known" of this evidence during trial (Pet. 13) and that his duty to exercise diligence was satisfied by a general pretrial request for "all discoverable materials relating to McCoy" (Pet. 14). But whether the prosecution also "knew or should have known" of the existence of McCoy's grand jury testimony is irrelevant in assessing petitioner's own diligence; moreover, a pretrial discovery request has no bearing on whether petitioner exercised diligence after first learning, during trial, that McCoy previously had appeared before a grand jury.

DOJ-1986-05